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No. 81-130

In the Supreme Court of the United States

OCTOBER TERM, 1981

WESTERN MINING COUNCIL, ET AL., PETITIONERS

v.

JAMES G. WATT, SECRETARY OF INTERIOR
OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

ANTHONY C. LIOTTA
Acting Assistant Attorney General

ROBERT L. KLARQUIST
JAMES C. KILBOURNE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioners have standing to challenge the constitutionality of statutes authorizing the promulgation of regulations and providing criminal penalties for violations of those regulations, even though petitioners did not allege that prosecutions had been initiated or threatened or that regulations applicable to them had been promulgated.

2. Whether a court must accept as true legal conclusions contained in a complaint when ruling upon a motion to dismiss for failure to state a claim upon which relief can be granted.

3. Whether petitioners have standing to assert that certain portions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 *et seq.*, violate the Due Process Clause by altering preexisting contract rights.

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ORDER AND OPINION BELOW

The order of the district court dismissing petitioners' complaint with leave to amend (Pet. App. A-64) and the subsequent judgment of dismissal with prejudice (Pet. App. A-65) are unreported. The opinion of the court of appeals (Pet. App. A-66 to A-84) is reported at 643 F. 2d 618.

JURISDICTION

The opinion of the court of appeals affirming the district court's judgment (Pet. App. A-66 to A-84) was entered on April 23, 1981. The petition for a writ of certiorari was filed on July 20, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Western Mining Council,[1] several of its chapters, and individuals who mine and own unpatented mining claims[2] brought suit against the Secretary of the Interior in the United States District Court for the Eastern District of California challenging the constitutionality of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.* The district court dismissed the action for failure to state a claim upon which relief could be granted (Pet. App. A-64), and the court of appeals affirmed (Pet. App. A-66 to A-84).

2. The Federal Land Policy and Management Act of 1976 serves as the "organic act" for the Bureau of Land Management of the United States Department of the Interior. See H.R. Conf. Rep. No. 94-1724, 94th Cong., 2d Sess. 57 (1976). It defines certain goals for the Bureau in its administration of the public lands of the United States and establishes methods of land use planning and management.

Petitioners filed this action in 1977 seeking a declaratory judgment that FLPMA was unconstitutional in whole or in part[3] (Pet. App. A-10). They also sought to enjoin the Secretary of the Interior from expending certain funds for enforcement of the Act (*ibid.*). They alleged, among other things, that the Act violated the Fourth, Fifth, and Sixth

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[1]According to the complaint, the Western Mining Council and its chapters are "non-profit trade associations whose members are miners and owners of unpatented mining claims and interests therein" (Pet. App. A-2).

[2]The use of the unpatented mining claims located under the mining laws of the United States is regulated by 30 U.S.C. 612.

[3]The specific provisions challenged were Sections 102(a)(1), 102(a)(13), 302(b), 303(a), 303(c), 303(e), 303(g), 304(b), 305(a), 310, 314, 501-504, and 601(c) of FLPMA, 43 U.S.C. 1701(a)(1), 1701(a)(13), 1732(b), 1733(a), 1733(c), 1733(e), 1733(g), 1734(b), 1735(a), 1740, 1744, 1761-1764, and 1781(c).

Amendments; the provisions of Article IV, Section 3, paragraph 2 empowering Congress to dispose of federal property and to make necessary rules and regulations concerning such property; and the two-year limitation upon appropriations for armies contained in Article I, Section 8, paragraph 12. The individual plaintiffs alleged that the Act injured them by infringing upon their contractual rights as owners of unpatented mining claims located prior to passage of the Act, by infringing upon their right to mine their claims, by exposing them to unlawful searches and seizures, by placing them in jeopardy of prosecution under unconstitutionally vague criminal statutes, by injuring them as federal and state taxpayers, and by denying their right to due process (Pet. App. A-5 to A-10). The Western Mining Council and its chapters claimed injury due to the alleged impairment of their members' ability to pay dues (*id.* at A-2).

Holding that the plaintiffs had "failed to state a justiciable claim" (Pet. App. A-64), the district court granted the Secretary's motion to dismiss the complaint for failure to state a claim upon which relief could be granted (*ibid.*) but gave the plaintiffs leave to amend their complaint (*ibid.*). When they failed to do so, the court dismissed the action with prejudice (Pet. App. A-65).

3. The court of appeals affirmed (Pet. App. A-66 to A-84). It held that plaintiffs lacked standing to assert the majority of their claims, since they had not alleged any actual or threatened injury resulting from the relevant provisions of the FLPMA (*id.* at A-73 to A-77, A-79 to A-82), and that their remaining claims were based upon erroneous interpretations of the law and had thus been correctly dismissed (*id.* at A-77 to A-79, A-82 to A-84).

The disposition of two of petitioners' claims is especially pertinent for present purposes. Petitioners claimed that 43 U.S.C. 1732(b), 1733(a) and (g), and 1740 constituted an

unconstitutionally vague criminal statute (Pet. App. A-6 to A-8). Section 1732(b) directs the Secretary of the Interior to "take any action necessary to prevent unnecessary or undue degradation of [public] lands"; Section 1733(a) directs the Secretary to issue regulations implementing the Act and provides criminal penalties for violations of those regulations; Section 1733(g) prohibits the "use, occupancy, or development" of public lands contrary to regulations or orders issued pursuant to those regulations and Section 1740 directs the Secretary to issue regulations implementing the Act and provides that the public lands be administered under existing rules to the extent possible until the Secretary promulgates new ones.

Petitioners' complaint interpreted these provisions to mean that "the [Secretary] or his delegates has (*sic*) a free hand to make criminal any activity which [he] may choose to deem 'unnecessary or undue degradation of the lands[']" and to make such activity a crime "before [he] or his delegate[] has even described it" (Pet. App. A-7). Petitioners claimed that these provisions were therefore unconstitutionally vague (*id.* at A-7 to A-8). Petitioners alleged that they were threatened with prosecution under those provisions because former Secretary of the Interior Cecil Andrus had said that they could not "dig in the ground" (*id.* at A-3). The complaint paraphrased this alleged statement, rather than providing a direct quotation, and did not specify when or where the alleged statement had been made or had appeared.

The court of appeals rejected petitioners' legal conclusion that the statutes in question authorized spontaneous criminal lawmaking, noting that criminal penalties could be imposed only for the violation of a lawful regulation promulgated in the manner prescribed by the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* (Pet. App. A-74). The court further held that the statement allegedly made by

former Secretary Andrus was "not a sufficiently specific threat of prosecution to confer standing upon plaintiffs" (Pet. App. A-75).

Petitioners also claimed that certain provisions of the FLPMA altered "contracts" they had made with the government, pursuant to the Mining Law of 1872, when they began mining their claims (Pet. App. A-5 to A-6). Petitioners alleged that under that law, the government had offered to convey title to mining claims upon the performance of certain conditions (*ibid.*). By adding additional conditions, petitioners contended, the contracts were altered, in violation of the Due Process Clause (*ibid.*).

The court of appeals held that petitioners lacked standing to assert this claim because they had failed to allege that the provisions in question were exclusively applicable to owners of unpatented mining claims or that any action against them pursuant to those provisions had been taken or threatened (Pet. App. A-76 to A-77).

ARGUMENT

Petitioners maintain that the decision below conflicts with various decisions of this Court. In fact, however, there is no conflict. The court of appeals correctly applied settled legal principles in upholding the dismissal of petitioners' claims, and there is thus no occasion for further review by this Court.

1. Petitioners argue (Pet. 9-12) that the decision of the court of appeals conflicts with *Doe* v. *Bolton*, 410 U.S. 179 (1973), in which it was held that physicians had standing to challenge the constitutionality of statutes regulating abortions, even though the physicians had not been prosecuted under those laws or threatened with prosecution. Although the petition does not make it clear, this argument apparently relates to the dismissal of petitioners' claim that certain provisions of the FLMPA constitute an unconstitutionally vague criminal statute (see Pet. App. A-75).

Petitioners' argument fails for at least two reasons. First, the court below upheld the dismissal of their claim, not only because they lacked standing, but also because the statutes in question were not unconstitutionally vague (Pet. App. A-74 to A-75). Petitioners apparently do not seek review of that decision.

Second, the situation of the physicians in *Doe* v. *Bolton*, *supra*, is not at all comparable to petitioners'. The physicians were found to have asserted "a sufficiently direct threat of personal detriment" (410 U.S. at 188), because they were the persons "against whom these criminal statutes directly operate[d]" (*ibid.*) and because the state had a history of prosecutions under similar statutes (*id.* at 188-189). Here, by contrast, petitioners merely speculated that regulations would be promulgated, that the regulations would apply to them, that some of their present activities would be proscribed, and that they might therefore be prosecuted. The court of appeals properly held that petitioners could not assert their claim, for, as stated in *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974), in order to establish standing

> [i]t must be alleged that the plaintiff "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged statute or official conduct. *Massachusetts* v. *Mellon*, 262 U.S. 447, 448 (1923). The injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical." *Golden* v. *Zwickler*, 394 U.S. 103, 109-110 (1969); *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89-91 (1947).

The threat of injury to petitioners was not real and immediate, but pure conjecture. Standing was consequently lacking.

For similar reasons, the decision below does not conflict with *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), as petitioners claim (Pet. 24). In *Abbott*, which concerned the issue of "ripeness" rather than standing, drug companies and a manufacturers' association sought pre-enforcement review of certain regulations. This Court held that "a controversy 'ripe' for judicial resolution" (387 U.S. at 148) was presented because the applicability of the regulations to the companies was clear-cut; the regulations would be effective immediately upon publication; immediate compliance was expected; compliance would be costly; and noncompliance would subject the companies to serious civil and criminal penalties (*id.* at 152-153). Here, by contrast, it was not even alleged that regulations had been drafted or proposed, and obviously, therefore, both their applicability to petitioners and their content were unknown.

2. Petitioners maintain (Pet. 22-24) that the court below erred in refusing to accept the truth of the legal conclusions contained in their complaint. Again, although the petition is unclear, this argument apparently relates primarily to petitioners' challenge to portions of the FLMPA on vagueness grounds (see Pet. App. A-74). As noted, petitioners' complaint construed those provisions as authorizing the Secretary to make conduct criminal "before the Secretary or his delegate has even described it" (*id.* at A-7). The court of appeals rejected that interpretation of the law (*id.* at A-74), but petitioners contend that the court was bound to accept the construction contained in their complaint in ruling upon a motion to dismiss for failure to state a claim upon which relief can be granted.

Petitioners' argument is clearly incorrect. While well-pleaded and material factual allegations in the complaint must be accepted in ruling upon a motion to dismiss for failure to state a claim upon which relief can be granted (see, *e.g.*, *Jenkins* v. *McKeithen*, 395 U.S. 411, 421 (1969);

Walker Process Equipment, Inc. v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-175 (1965)), conclusions of law need not be. *Mitchell* v. *Archibald & Kendall, Inc.*, 573 F. 2d 429, 432 (7th Cir. 1978); *Hiland Dairy, Inc.* v. *Kroger Co.*, 402 F. 2d 968, 973 (8th Cir. 1968), cert. denied, 395 U.S. 961 (1969); *Ogden River Water Users' Association* v. *Weber Basin Water Conservancy*, 238 F. 2d 936, 940 (10th Cir. 1956); 2A *Moore's Federal Practice* para. 12.08 at 2266-2269 (1981). If petitioners' argument were correct, then plaintiffs could prevent the dismissal of legally unsound claims simply by alleging patently incorrect legal conclusions to support those claims.

Although petitioners invoke (Pet. 22-24) *United States* v. *Mississippi*, 380 U.S. 128 (1965), and *United States* v. *Employing Plasterers Association*, 347 U.S. 186 (1954), in those cases this Court was clearly referring to factual allegations, not matters of law.[4]

3. Finally, petitioners contend (Pet. 25-26) that the court below erred in upholding the dismissal of their claim that certain provisions[5] of the FLMPA altered preexisting contract rights. The court of appeals discussed each of the

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[4]In *United States* v. *Mississippi*, *supra*, 380 U.S. at 143, this Court stated that "the allegations of the complaint are to be taken as true," but the allegations in questions were factual, *viz.*, that Mississippi had practiced racial discrimination in the area of voting for many years (*id.* at 143-144).

In *United States* v. *Employing Plasterers Association*, 347 U.S. 186 (1954), the United States brought a civil action under Section 1 of the Sherman Act, 15 U.S.C. 1, which requires proof of a restraint on interstate commerce. The district court dismissed, holding that the complaint lacked factual allegations concerning an effect on interstate commerce (347 U.S. at 188). This Court reversed because the fact that interstate commerce had been affected was adequately alleged in the complaint (*ibid.*).

[5]The petition refers to Section 302(b) of the Act, 43 U.S.C. 1732(b) (Pet. 25). The complaint, on the other hand, referred to Sections 304(b), 305(a), 501-504, and 601(c) of the Act, 43 U.S.C. 1734(b), 1735(a), 1761-1764, 1781(c) (Pet. App. A-5 to A-6).

relevant statutes and, without deciding whether petitioners had acquired something akin to contract rights under the Mining Law of 1872, concluded that no alteration of those "rights" had yet taken place or been threatened pursuant to those statutes. We rely upon the thorough treatment of this issue by the court below (Pet. A-75 to A-77).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

ANTHONY C. LIOTTA
Acting Assistant Attorney General

ROBERT L. KLARQUIST
JAMES C. KILBOURNE
Attorneys

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